

Before the
COPYRIGHT ROYALTY JUDGES
 Washington, D.C.

 In the Matter of)

)
 Distribution of the 2004, 2005, 2006, 2007,)
 2008 and 2009 Cable Royalty Funds)

Docket No. 2012-6 CRB CD 2004-2009
 (Phase II)

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 In the Matter of)

)
 Distribution of the 1999-2009 Satellite)
 Royalty Funds)

Docket No. 2012-7 CRB SD 1999-2009
 (Phase II)

**SETTLING DEVOTIONAL CLAIMANTS' OPPOSITION TO INDEPENDENT
 PRODUCERS GROUP'S MOTION TO AMEND DIRECT STATEMENT**

The Settling Devotional Claimants ("SDC") oppose IPG's Motion to Amend its Direct Statement.

IPG's motion should be denied because the amended results presented by Dr. Cowan are derived from an impermissible and unjustified methodological and because IPG's attempts at amendment have caused the SDC prejudice.

A. IPG's Amended Direct Statement contains an unjustified methodological change from level-level regression to log-level regression.

In the Oct. 7 Order, the Judges held that in "the absence of any explanation how this change corrected a data error, the Judges must conclude that it was a methodological change" because "Dr. Cowan modified the formulas that he used." Oct. 7, 2016 Order. In its Motion to Amend, IPG has again failed to explain why its change is necessary to correct an error. IPG admits that "nominal changes were made to Dr. Cowan's description of his propounded

UNDERSIZED DOCUMENTS

AB did...

- ☒ Docketed (all cases)
- ☒ Store on shared drive
- ☒ Distributed to all
- ☐ Emailed
- ☐ Outlook Updated
- ☐ Service List Updated

methodology,” but those nominal descriptions are insufficient to explain or justify this change in methodology. IPG Motion to Amend at 10. Dr. Cowan has never explained why the *changed formulas* were necessary to correct the data errors. Rather, he indicates that he was able to correct the data errors by correcting matching of certain programs to specific claimants, and *then* chose to adjust his formulas to perform a regression using the revised dataset. *See* Cowan Dec. ¶ 4 (noting that “the database containing matches of broadcasts to program names ... had to be recreated”), ¶ 6 (“The only other change to my report was the use of a logarithm in scaling the dependent variable ...”).

It is clear that there was a change in the regression formula from a level-level to a log-level model, and that this change impacted his results beyond any changes caused by adjustments to his data processing. IPG argues that “the mere change in IPG’s claimed percentages cannot be attributable exclusively to Dr. Cowan’s change from a linear relationship to a logarithmic relationship.” IPG Motion to Amend at 4. But the problem with IPG’s Motion to Amend is the inverse: the changes to the Amended Direct Statement are not *merely* the result of *correcting data errors*, and it remains unclear how the decision was made to change the methodology and how significant that change was to Dr. Cowan’s results.¹

In order to justify additional changes beyond correcting a data error, IPG would need to both explain those changes and justify the reason for the change, allowing the Judges and other

¹ IPG asserts that “the SDC and MPAA either misled the Judges by suggesting that the exclusive basis for percentage changes was the ‘linear to logarithmic’ calculation, or failed to review the data that was provided to them by IPG and Dr. Cowan. To highlight this point, in his September 22, 2016 declaration, Dr. Erdem asserted that ‘IPG appears to have only produced the data and calculations for log-level regression, as described in its Amended Direct Statement, and not a level-level regression, as described in its Original Direct Statement’, even though the databases for both of Dr. Cowan’s reports had been produced on September 15, 2016, a week prior.” IPG Motion to Amend at 5-6, n.9. In fact, IPG initially did not produce data supporting Dr. Cowan’s original Report and his level-level regression. Exhibit A, Sept. 20 Emails from M. MacLean to B. Boydston. IPG’s counsel did not produce data underlying the original Cowan Report until Sept. 25, and did not clarify that Dr. Cowan “overwrote” the data supporting the first amended Cowan Report until Sept. 27. Exhibit B, Sept. 25-27 Emails between B. Boydston and M. MacLean.

parties to understand and evaluate those changes directly. Instead of justifying its methodological changes, IPG admits that Dr. Cowan could “calculate his results under a linear scale’ and submit such revised calculations,” but chose not to do so. IPG Motion to Amend at 12. The example offered by Dr. Cowan to describe the data changes falls short of explaining how the amended statement differs from the original in order to “assist other participants in identifying the new or modified material in the amended statement.” Oct. 7, 2016 Order at 3. Dr. Cowan indicated that “the SDC had a net increase of 89 program broadcasts in the stations analyzed,” but concluded that “the net difference was not substantial.” Cowan Dec. ¶ 5. It is unclear if the “net difference” of 89 programs means that 89 more SDC programs than IPG programs were added by Dr. Cowan’s changes, or whether the total number of SDC programs is 89 names larger at the end of Dr. Cowan’s changes. IPG did not provide any documentation that lists the changes so that the parties can track whether they were truly corrections and evaluate whether they were done consistently or fairly for all parties, instead simply stating that “there was a substantially larger change in recognized programs and broadcasts for the MPAA and IPG.” Cowan Dec. ¶ 5. This description is inadequate and does not provide the other parties an adequate understanding of how these changes affected the data, and certainly does not justify the change in scaling.

Even though IPG claims to have produced the data underlying its original Direct Statement and its proposed Amended Direct Statement, the SDC’s expert has been unable to replicate Dr. Cowan’s changes in their entirety due to a lack of a comprehensive description of the changes and their purpose. Erdem Dec. ¶ 5. These deficiencies could only be resolved by transparency from Dr. Cowan as to what data entries were changed and how his models adjusted to the changes.

In his declaration, Dr. Cowan only attempted to justify the change with a fundamentally-flawed comparison of the two models using two values that are not comparable due the changes in variables used in Dr. Cowan's two formulas. Erdem Dec. ¶ 8. Dr. Erdem quotes the textbook *Econometric Analysis* to explain why Dr. Cowan's comparison of R-squared values to suggest log-level regression was appropriate makes no sense: "the question cannot be answered with a direct comparison. An R-squared for the linear regression model is different from R-squared for the log-linear model." Erdem Dec. ¶ 8 (quoting Greene, William, *Econometric Analysis*, 4th Ed., Prentice Hall, 2000, page 241). Additionally, Dr. Cowan's refusal to explain his reasoning in choosing a new formula highlights the fact that more than simple comparison of the mathematical results is necessary: "The choice of functional form is a matter of economic intuition, real-world facts or experience, and statistical properties of different choices, such as 'goodness of fit.'" Erdem Dec. ¶ 6. Dr. Cowan did not identify why any of these factors dictated a *change* in the functional form as a result of any data corrections he made.

As a result, there is no basis for the Judges to accept that the change in formulas, either as a justified methodological change or as necessary to correct a genuine data error.

B. IPG's Amended Direct Statement should be rejected on grounds of prejudice and estoppel.

The Judges indicated in their Oct. 7 Order that they had not yet decided "what standards IPG would need to meet for the Judges to grant," in their discretion, a motion to amend based on a "genuine error or mistake." Oct. 7, 2016 Order at 4, n.6. IPG asserts that "prejudice to an adverse party should be the *primary* issue as to whether an amended direct statement should or should not be allowed as a matter of the Judges' discretion." IPG Motion to Amend at 9. Under a prejudice standard alone, the Judges should deny the Motion to Amend.

Further, this situation calls for the application of the equitable estoppel doctrines the SDC raised in support of its Motion to Strike the first IPG Amended Direct Statement. Under the doctrines of equitable and judicial estoppel, IPG should be estopped from amending its Direct Statement. IPG seeks to “assert an inconsistent position” to “derive an unfair advantage or impose an unfair detriment on the opposing party.” *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (applying judicial estoppel). Further, the SDC have acted “in reliance upon the other party’s conduct by which [they] will now be prejudiced if the facts are shown to be different from those upon which [they] relied.” *Galt v. Phoenix Indem. Co.*, 120 F.2d 723, 726 (D.C. Cir. 1941) (applying equitable estoppel). Thus, the Judges should consider the entire course of conduct that IPG has engaged in to determine whether amendment at this stage and in this manner is appropriate.

IPG’s conduct with respect to amending the shares it set forth in its original Direct Statement has caused, and continues to cause, prejudice to the SDC and other parties in these proceedings. Initially, the SDC’s attempt to narrow the issues by consenting to IPG’s initial Direct Statement shares for satellite royalties has been derailed. The SDC are now at a strategic disadvantage because they took a position “in reliance upon” IPG’s representations regarding their proposed distribution shares, and now IPG has changed those shares. Whether IPG did so with the intention of undercutting the SDC’s consent, or simply because IPG’s counsel inexplicably failed to review Dr. Cowan’s report prior to filing it, does not change the fact that IPG changed its numbers after the SDC acted in reliance on them. The SDC have shown their hand with respect to this issue and IPG has additional information about SDC’s litigation strategy that it did not have before. The estoppel cases cited above do not require that IPG has

actually used its newfound advantage to harm SDC, it is enough the IPG now has a new and unfair point of leverage against SDC as a result of its conduct.

But IPG's prejudicial conduct extends beyond the mere content of the new Amended Direct Statement. Since its first attempt to file an Amended Direct Statement on Aug. 31, IPG has failed to provide the necessary information to the other parties that would allow them to evaluate the proposed changes. First, IPG failed to produce the documents and data underlying its original Aug. 22, 2016 Direct Statement. Exhibit A, Sept. 20 Emails from M. MacLean to B. Boydston. IPG did produce that data nearly two weeks later. Exhibit B at 3, Sept. 25-27 Emails between B. Boydston and M. MacLean. Then, IPG admitted that Dr. Cowan "overwrote" the data underlying the results it filed in its original Amended Direct Statement on Aug. 31, 2016, and therefore could not provide any backup for those changed results.² Exhibit B at 1, Sept. 25-27 Emails between B. Boydston and M. MacLean. Instead, IPG has moved on to a third set of results (which now appear in the proposed Amended Direct Statement). The constant changes in the results have placed additional burdens on other parties to revise and review new numbers and new data as IPG decides to provide them. The persistent failure to identify and explain the changes made for both amended sets of results that IPG has filed continues to hamper the ability of the SDC to respond to these changes on their own merits. Without any data underlying the "intermediate" set of results filed by IPG on Aug. 31, the SDC cannot evaluate how IPG's changes have evolved since the original filing on Aug. 22.

² IPG suggests that the fact that "no documents existed reflecting the interim satellite calculations" has been "remedied" because "the SDC nevertheless had an opportunity to issue follow-up discovery requests on that matter." IPG Motion to Amend at 8, n.11. Left unsaid, of course, is that IPG refused to produce any documents responsive to those follow-up discovery requests and the SDC were forced to file a Motion to Compel, which is still pending.

IPG has also made a series of questionable assertions in its Motion to Amend that suggest there are additional problems with its changes. First, Dr. Cowan claims that he proposed a “methodology that has never been presented to the court ... a standard application of regression theory.” Oct. 17, 2016 Cowan Dec. ¶ 3. However, the use of regression is not a novel methodology in these proceedings. Erdem Dec. ¶ 9. Denying IPG’s Motion to Amend does not require rejecting the use of regression. Further, Dr. Cowan describes the errors he fixed as arising in “the *earlier processing of the files I had been given* regarding the classification of television shows” and notes that “some of the *earlier work done* matching the program names was also incorrect ... and *had to be recreated.*” Cowan Dec. ¶ 4 (emphasis added). This suggests that the errors were made by the person who prepared the files and provided them to Dr. Cowan, rather than errors made by Dr. Cowan. If that is the case, then the parties are entitled to an explanation for how Dr. Cowan’s data files were generated and processed before he received them in order to evaluate whether these “errors” were not made by the economic experts, and whether the true persons preparing the files may have made any other errors, omissions, or changes.

Finally, IPG still has not provided its justification for changing its scaling methodology in a manner that allows the other parties to address Dr. Cowan’s economic reasoning for making the change. Dr. Cowan’s explanation in his declaration simply explains two general reasons one type of regression may be better than another, explaining the differences hypothetically and in the context of Dr. Erdem’s example rather than in the context of his own data and analysis. First, he argued that “the fit of the regression to the data available *may be better*” as one reason to use a different regression model, and then referred to Dr. Erdem’s example to explain. Cowan Dec. ¶ 9 (emphasis added). Second, he argued that the “second obvious reason for using a logarithmic

scale that is *demonstrated by Dr. Erdem's example* is that it protects the user by giving one an option to better fit the shape of the data and to avoid making unwarranted predictions.” Cowan Dec ¶ 9 (emphasis added). Crucially, Dr. Cowan did not explain why using a logarithmic scale in his amended calculations allowed him to “avoid making unwarranted predictions.” Instead, he simply predicts that Dr. Erdem would have critiqued his choice of scaling had he not made a change. Cowan Dec. ¶ 10. This completely ignores the fact that Dr. Erdem has been unable to critique Dr. Cowan’s choice of scaling because Dr. Cowan has completely failed to explain that choice. Cowan Dec. ¶ 6 (“I am unclear at which juncture I was obligated to articulate my reasoning.”). Simply put, IPG needed to explain its choices in order to allow the SDC and other parties a fair opportunity to evaluate and possibly challenge them. IPG has continuously refused to do so.

C. Conclusion

IPG’s Motion to Amend should be denied because it fails to adequately explain or justify its changes, and the amendment should be estopped because it would cause unfair prejudice.

October 25, 2016

Respectfully submitted,

Matthew J. MacLean /M.W.

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Counsel for Settling Devotional Claimants

CERTIFICATE OF SERVICE

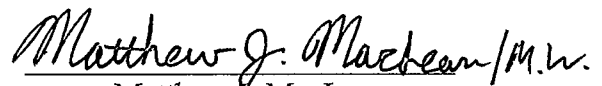
I, Matthew J. MacLean, hereby certify that a copy of the foregoing was sent electronically and by overnight mail on October 25, 2016, to the following:

INDEPENDENT PRODUCERS GROUP

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Pick & Boydston, LLP
10786 Le Conte Avenue
Los Angeles, CA 90024

PROGRAM SUPPLIERS

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Lucy Holmes Plovnick
Mitchell Silberberg & Knupp LLP
1818 N Street, NW
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Washington, DC 20036


Matthew J. MacLean

**Before the
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In the Matter of)	Docket No. 2012-6 CRB CD 2004-2009
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In the Matter of)	Docket No. 2012-7 CRB SD 1999-2009
)	(Phase II)
Distribution of the 1999-2009 Satellite)	
Royalty Funds)	
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DECLARATION OF ERKAN ERDEM, PH.D.

I, Erkan Erdem, hereby state and declare as follows:

1. I am a Managing Director at KPMG LLP in the Economic and Valuation Services practice. To assist with the distribution of royalties associated with the retransmission of broadcasts signals by cable in years 2004-2009 and by satellite in 1999-2009, I have been retained by the Settling Devotional Claimants (SDC), one of the two groups of claimants in the Devotional category in the matter of distribution of 2004-2009 Cable Royalty Funds and 1999-2009 Satellite Royalty Funds.

2. I reviewed the Independent Producers Group's Motion to Amend Direct Statement which included a declaration from Dr. Cowan in this proceeding (dated October 17, 2016). Previously, I reviewed a) the Original and Amended Direct Statements filed by IPG, IPG's Opposition to MPAA's Motion to Strike Amended Direct Statement which included Dr. Cowan's declaration (dated September 9, 2016); b) IPG's Opposition to the SDC's Motion to Strike Amended Direct Statement, which included Dr. Cowan's declaration (dated September 13,

2016); and c) the Declaration of Jeffrey S. Gray, Ph.D., submitted as part of MPAA's Reply to IPG's Opposition to MPAA's Motion to Strike Amended Direct Statement of IPG.

3. Dr. Cowan acknowledges that he changed his regression model from a linear equation in the Original Statement to a logarithmic equation in the Amended Direct Statement. Dr. Cowan and I agree that Dr. Cowan is using a regression approach, and that his regression analysis, called multivariate regression analysis, is a commonly used method in statistics and economics to investigate marginal effects of (independent) variables on another (dependent) variable. The issue posed by Dr. Cowan's latest declaration is whether using the value of subscribers or its natural logarithm as the dependent variable is a change in the methodology.

4. The choice of using a level-level regression or a log-linear regression is typically discussed under the heading of "functional form" or "model specification" in statistics or econometrics textbooks, all under the "regression" main heading or chapter.¹ Within the regression analysis, a log-level model, compared to a level-level model, is a different "functional form" or "specification." Using a transformed variable, such as taking the natural logarithm, is also known as "scaling." By *changing* the functional form or the specification of his regression model, Dr. Cowan assumes a *significantly different* type of relationship between subscribers and number of SDC or IPG broadcasts. This *material change* also leads to a *totally different* sets of coefficient estimates, *totally different* interpretation of coefficient estimates, and *totally different* royalty share estimates based on his predictions. I emphasize the importance of the words "changing" and "different" in this paragraph precisely because Dr. Cowan argues that he *did not*

¹ See, for example, Section "6.2. More on Functional Form" in Wooldridge, Jeffrey M., *Introductory Econometrics, A Modern Approach*, 4th ed., South-Western Cengage Learning, Mason Ohio, 2008. Also, see Section "8.3. Nonlinearity in the Variables" in Chapter 8. Functional Form, Nonlinearity, and Specification" in Greene, William, *Econometric Analysis*, 4th Ed., Prentice Hall, 2000.

change his methodology by using a log-level regression instead of a level-level regression within the regression approach.

5. Even though IPG originally premised the need for filing an amended report from Dr. Cowan on the grounds that he needed to correct data errors, Dr. Cowan's revised data processing and subsequent calculations contain numerous errors in addition to the change in methodology. Because of changes in data processing and other errors, our ability to substantiate the rationale for his amended report and verify the results of his calculations have been compromised. Even if the data used in the regressions for the Original and Amended Direct statements were unchanged (i.e., data was correctly prepared for the regression analysis and were the same across the two statements), changing only the functional form from a level-level regression to a log-linear regression would necessarily lead to a different sets of coefficient estimates, different interpretation of coefficient estimates, and different royalty shares based on his predictions.

6. Because Dr. Cowan changed his model between the Original and Amended Direct statements, both Dr. Gray and I, seeking for an economist's reasoning, questioned what led to the change. The choice of functional form is a matter of economic intuition, real-world facts or experience, and statistical properties of different choices, such as "goodness of fit." As Dr. Cowan explains, R-squared is a commonly used measure that explains which model explains more of the variability in the dependent variable.² When faced with multiple potentially reasonable model options, one may pick the model with the highest value of R-squared, which varies between zero and one.³ Using the data from his Amended Direct statement, it appears that

² Paragraphs 12-14 of Declaration of Dr. Charles Cowan, October 17 2016.

³ Without getting into too much econometric detail, one would "adjust" for the number of independent variables (i.e., use an alternative version called adjusted R-squared), if that changes across models.

Dr. Cowan estimates both the log-level and level-level regressions, and provides the values for R-squared for both cable and satellite. Dr. Cowan then explains that the log-linear models had slightly higher values for R-squared than the level-level (or linear) models (about 2.3%-2.5% for satellite and cable, respectively).

7. First, it is not clear to me how the comparison of R-squared values for the log-level and level-level models demonstrates “*mathematically* that my allocated percentage shares to IPG, MPAA, and the SDC, were not significantly affected [by] the use of logarithmic versus linear scaling.”⁴ The comparison of R-squared values has nothing to do with the differences in shares I have seen in Dr. Cowan’s Original and Amended Direct statements. To support that statement one would need to compute the royalty shares under both models and analyze the magnitude in the change of the percentages.

8. Second, it is contrary to sound econometric reasoning for Dr. Cowan to argue that one can compare R-squared values of two models with different dependent variables.⁵ The R-squared can be compared across models only if both models have the same dependent variable. This is a fundamental concept in understanding the implications of model specification:

Little can be said about the relative quality of fits of regression lines in different contexts. One must be careful, however, even in a single context, to be sure to use the same basis for comparison for competing models. Usually, this concern is about how the dependent variable is computed. For example, a perennial question concerns whether a linear or log-linear model fits the data better. Unfortunately, the question cannot be answered with a direct comparison. *An R-squared for the linear regression model is different from R-squared for the log-linear model. Variation in y is different from variation in ln y.*⁶

This fact is another reason why level-level and log-level models are very “different” approaches.

⁴ Paragraph 14 of Declaration of Dr. Charles Cowan, October 17 2016.

⁵ Paragraphs 12-14 of Declaration of Dr. Charles Cowan, October 17 2016.

⁶ Greene, William, *Econometric Analysis*, 4th Ed., Prentice Hall, 2000, page 241 (emphasis added).

9. There are also a few statements in IPG's Motion to Amend Direct Statement or in Dr. Cowan's declaration with which I strongly disagree. First, Dr. Cowan argues that regression approach he presented "is a methodology that has never been presented to the court."⁷ This statement is false. Even though I have not been involved in all of the historical distribution proceedings, in my tenure and my review of prior cases, I have seen other experts present regression analyses to the Judges. As an example, Dr. Gray, who is an economic expert for MPAA, has used regression analyses in the past for the 1999-2009 satellite and 2004-2009 cable cases in the program suppliers category.

10. Second, in IPG's Motion to Amend Direct Statement, IPG states the following:

Dr. Cowan's report, for the first time in any distribution proceeding, attempted to implement the Shapley Valuation analysis expressly sought by the Judges.⁸

This statement is not only false, but it also misstates Dr. Cowan's own testimony. As the Judges may recall, I have previously stated that the Shapley analysis cannot be used in these proceedings due to high costs and unavailability of required data. In his Amended Direct Statement, Dr. Cowan expressly agreed with me and added:

Dr. Erdem *understates the difficulty of using Shapley values*, because no amount of expenditure would make it possible to derive the relative marginal values.⁹

Dr. Cowan did not propose a methodology based on Shapley values. He did not even "attempt" to employ such a methodology, as IPG claims in the Motion to Amend Direct Statement.

11. Third, even though Dr. Cowan accepts that he changed the dependent variable in his regression analysis,¹⁰ which necessitated changes to equations (1) and (2) between the Original and Amended Direct testimonies, he adds the following:

⁷ Paragraph 3 of Declaration of Dr. Charles Cowan, October 17 2016.

⁸ IPG's Motion to Amend Direct Statement, page 1.

⁹ Paragraph 8 of Dr. Cowan's Amended Direct Statement, August 30, 2016 (emphasis added).

The regression method I used in the later calculations is exactly the same. The variables I used are exactly the same. Subscriptions are on the left hand side of the equation, while the number of programs offered by each of the parties are on the right hand side, plus controls for time in year and for the stations offering the programs. As noted in the appendix to my report, the coefficients are the percentage change in subscriptions due to a unit change in the number of programs offered by a party in the proceeding. Accordingly, the text of the two reports, dated August 22 and August 30, are identical in terms of explaining that a regression was being used, the same variables included in the regression, and the interpretation of the coefficients. The identical nature of the submitted methodology can be readily evaluated by the court by simply holding up and comparing the two texts.¹¹

This paragraph has numerous false and misleading statements. In his Original Direct Statement (dated August 22, 2016), Dr. Cowan uses a linear regression, which has subscriptions on the left hand side. However, in his Amended Direct statement, the regression has the natural logarithm of subscriptions on the left hand side. By reviewing Dr. Cowan's computer codes for his Original and Amended Direct statements, I confirmed the change in the dependent variable (as Dr. Cowan agrees elsewhere in his declaration) between the two statements. For the same reason, it is false to state that the "variables used are exactly the same." Only the variables on the right hand side of the equation are the same. Anyone who compares the two texts can see the changes in equations (1) and (2), so it is false to claim that the methodology is identical. Finally, the "interpretation of the coefficients" for the two models are not the same, unlike Dr. Cowan misleadingly claims.

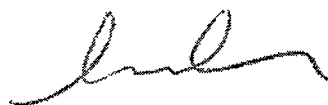
12. To conclude, I view the change in the functional form between Dr. Cowan's Original Statement and Amended Direct Statement as a change in the methodology. Dr. Cowan argues that any model under the "Regression Analysis" chapter is the same and that using a log-level model instead of a level-level model does not mean a change in the "methodology." This is

¹⁰ Paragraphs 9 and 10 of Declaration of Dr. Charles Cowan, October 17 2016.

¹¹ Paragraph 17 of Declaration of Dr. Charles Cowan, October 17 2016.

equivalent to thinking that a Honda Civic is the same car as a Chevy Suburban simply because both are labeled "cars." A change in the dependent variable clearly assumes a different relationship between the dependent variable and the independent variables, and it leads to very different results - indicating a significant change in the approach. Additionally, having reviewed the data, computer code, and calculations provided to me by counsel for Dr. Cowan's analyses, I can now confirm that Dr. Cowan not only made some corrections to his data processing, but also changed the methodology between the Original and Amended Direct Statements.

I hereby declare under penalty of perjury that the foregoing is true and correct.



October 25, 2016

Erkan Erdem, Ph.D

Exhibit A

From: MacLean, Matthew J.
To: Brian D. Boydston, Esq.; Harrington, Clifford M.; Draper, Victoria L.; goo@msk.com; lhp@msk.com; Warley, Michael A.
Subject: RE: IPG Discovery Responses
Date: Tuesday, September 20, 2016 5:59:05 PM
Attachments: [image001.png](#)
[image002.png](#)

Brian,

In addition to the matters raised below, it appears that Dr. Cowan's satellite results produced in discovery do not match his results reported in either his initial or his amended written direct statement. Please explain, and produce the data and code files used to generate the results that he *actually testified to*. More "errors"?

Matthew J. MacLean | Partner
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NASHVILLE NEW YORK NORTHERN VIRGINIA PALM BEACH SACRAMENTO
SAN DIEGO SAN DIEGO NORTH COUNTY SAN FRANCISCO SHANGHAI
SILICON VALLEY TAIPEI WASHINGTON, DC



From: MacLean, Matthew J.
Sent: Tuesday, September 20, 2016 11:39 AM
To: Brian D. Boydston, Esq.; Harrington, Clifford M.; Draper, Victoria L.; goo@msk.com; lhp@msk.com; Warley, Michael A.
Subject: RE: IPG Discovery Responses

Brian,

I am writing to demand that IPG immediately produce its data and code files used to generate Dr. Cowan's results in his initial written direct statement in the 1999-2009 satellite and 2004-2009 cable cases. The production you have provided appears only to contain code files for the amended written direct statement.

Multiple discovery requests sought production of data and code files for the initial results, and IPG asserted no objection to these requests (other than improper and non-specific general objections that are tantamount to making no objection at all). See, e.g., SDC Document Requests 1, 4, 5, 7, 15, 19.

As you know, our reply in support of our motion to strike IPG's amended direct statement is due on Thursday. The reason for the changes between IPG's initial and amended direct statements, and whether they were truly the result of an "error" or a change in methodology from a linear

regression to a log-linear regression, is a central issue – both in this motion and more generally in connection with IPG and Dr. Cowan’s credibility. IPG and Dr. Cowan have yet to identify a single “error,” or to produce any document identifying or allowing us to identify any “error” resulting in the very substantial differences between the results in the original and amended written direct statement. It certainly appears that IPG’s failure to produce the documents required was designed to interfere with our ability to identify the differences ourselves in advance of replying to your opposition.

Relatedly, no files have been produced supporting Dr. Cowan’s statement in his amended direct statement, “A similar result is found when the natural logarithm of Y is used as the dependent variable, except that changes are now expressed as proportional changes.” This statement would appear to indicate that Dr. Cowan performed two regressions – one linear and one log-linear – and compared the results. But the *only* computation in the documents produced uses a log-linear regression, consistent with the formula in the amended direct statement. None contains a linear regression consistent with the initial direct statement. Either Dr. Cowan never actually performed the comparison described, or IPG has withheld documents.

Please provide the necessary files today. I am available to meet and confer today if you would like.

Matthew J. MacLean | Partner
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NASHVILLE NEW YORK NORTHERN VIRGINIA PALM BEACH SACRAMENTO
SAN DIEGO SAN DIEGO NORTH COUNTY SAN FRANCISCO SHANGHAI
SILICON VALLEY TOKYO WASHINGTON, DC



From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Monday, September 12, 2016 4:51 PM
To: Harrington, Clifford M.; MacLean, Matthew J.; Draper, Victoria L.; goo@msk.com; lh@msk.com
Cc: worldwidesg@aol.com
Subject: IPG Discovery Responses

Counsel,

Attached hereto are IPG's responses to discovery requests of the SDC and MPAA.

Brian Boydston

Exhibit B

Draper, Victoria L.

From: Brian D. Boydston, Esq. <brianb@ix.netcom.com>
Sent: Tuesday, September 27, 2016 7:47 PM
To: MacLean, Matthew J.
Cc: goo@msk.com; lhp@msk.com; Harrington, Clifford M.; Draper, Victoria L.
Subject: Re: 1999-2009 Royalty Distributions

There is nothing suspicious going on here, just mistakes.

Brian

-----Original Message-----

From: "MacLean, Matthew J."
Sent: Sep 27, 2016 4:42 PM
To: "Brian D. Boydston, Esq."
Cc: "goo@msk.com", "lhp@msk.com", "Harrington, Clifford M.", "Draper, Victoria L."
Subject: Re: 1999-2009 Royalty Distributions

Brian,

I am glad you finally understand my request.

The SDC will oppose your filing of yet another revision to Dr. Cowan's results, principally because I am far from persuaded that the very material changes were actually the result of an error. Your failure to preserve the data and calculations underlying the amended direct statement, along with the fact that it took you this long to admit that they were not preserved, only adds to suspicions.

Matt

Sent from my iPhone

On Sep 27, 2016, at 6:48 PM, Brian D. Boydston, Esq. <brianb@ix.netcom.com> wrote:

Matt,

The backup that is current for the second amended report is what we sent right after the August 30th report. We don't have a file that tells how Mr. Cowan got to the satellite calculations that were in the Aug. 30th report – they were based on an intermediate result that Mr. Cowan overwrote.

That didn't exist by the time we supplied the backup materials, and Mr. Cowan didn't even know he had copied anything off of them.

We have produced everything Mr. Cowan relied on for the August 22nd report and everything he relied on for the August 30th report. We do not have any materials encompassing the steps between the two reports, since they weren't anything Mr. Cowan was ever going to rely on.

Accordingly, we have no further materials to provide to you.

Also, you referenced Mr. Cowan's "unsworn" affidavit. That was an oversight. We will file one which is "sworn".

Brian

-----Original Message-----

From: "MacLean, Matthew J."

Sent: Sep 27, 2016 2:29 PM

To: "Brian D. Boydston, Esq."

Cc: "goo@msk.com", "lh@msk.com", "Harrington, Clifford M.", "Draper, Victoria L."

Subject: Re: 1999-2009 Royalty Distributions

Brian,

I want the backup calculations for the satellite results in Dr. Cowan's amended direct statement, not just the backup calculations for the result in this unsworn "affidavit" that is supposedly a correction to the amended direct statement. I want to know what he changed, and why. The brouhaha over his first methodological change clearly shows that I cannot take him at his word when he says he is merely making a correction.

This is my fourth and final time requesting this information. And frankly, I do not believe you that you do not understand my request, just like I do not believe that Dr. Cowan and IPG don't know the difference between a natural scale and a logarithmic scale. I hate to be so blunt about it, but this time you have gone too far feigning ignorance.

Matt

Sent from my iPhone

On Sep 27, 2016, at 5:12 PM, Brian D. Boydston, Esq. <brianb@ix.netcom.com> wrote:

Matt, the affidavit is something we will file with a corrected written statement.

As for documents underlying Mr. Cowan's calculations, I don't understand what you are looking for as we produced it prior to producing the backup for the second version.

Brian

-----Original Message-----

From: "MacLean, Matthew J."

Sent: Sep 26, 2016 12:54 PM

To: "Brian D. Boydston, Esq.", "goo@msk.com",
"lhp@msk.com", "Harrington, Clifford M.", "Draper, Victoria L."
Subject: RE: 1999-2009 Royalty Distributions

Brian,

Is the "affidavit" attached to your email below something that you intend to file with the Judges as part of yet another iteration of a written direct statement, or is it just something you are providing to us in discovery?

Regardless of your answer to this question, it does not excuse IPG from producing the documents underlying the results reported in the amended direct statement. Please produce the documents underlying the "earlier analysis of an incomplete data file" that purportedly led to the results in the amended direct statement.

Why do I have to keep asking for this? Are you really going to force us to go to the Judges over something you know you are required to produce?

Matthew J. MacLean | Partner
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street NW | Washington, DC 20036-3006
t 202.663.8183 | f 202.663.8007
matthew.maclea@pillsburylaw.com | website bio



From: Brian D. Boydston, Esq. [mailto:brianb@ix.netcom.com]
Sent: Sunday, September 25, 2016 12:07 PM
To: goo@msk.com; lhp@msk.com; Harrington, Clifford M.;
MacLean, Matthew J.; Draper, Victoria L.
Cc: worldwidesg@aol.com
Subject: 1999-2009 Royalty Distributions

Counsel,

We have been informed by Analytic Focus that the aggregate of the files that were utilized by Dr. Charles Cowan in the creation of his report of August 22, 2016, can be accessed through the attached link:

<https://analyticfocusllc.sharefile.com/d-sb8651cf99404069a>

As you will see, it is highly redundant of files that were already produced.

Additionally, it appears as though statements made by Mr. MacLean earlier this week were accurate, and that two of the tables appearing in Dr. Cowan's August 30, 2016 report incorrectly reported the results of his calculations. To that matter, attached please find an affidavit executed by Dr. Cowan.

Brian Boydston

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